No. 89.

Brief of Springer for Appts.

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JAMES H. McKENNEY,
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IN THE

SUPREME COURT

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UNITED STATES.

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THE SPRINGER LAND ASSOCIATION, ET AL., *Appellants*, vs. PATRICK P. FORD, *Appellee.*	No. 89. *Appeal from the Supreme Court of the Territory of New Mexico.*

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

Statement.

This is an action in chancery, brought by Patrick P. Ford, appellee, against The Springer Land Association and certain other defendants, to foreclose a mechanics' lien upon an irrigating

ditch and reservoir system, the land covered thereby, the right of way therefor, and the lands intended to be irrigated thereby. It is founded upon the following facts, which are taken from the statement of facts certified by the lower court.

On October 26, 1888, a contract was entered into between Patrick P. Ford of the one part, and The Spinger Land Association of the other, for the grading work in the construction of a certain ditch line and reservoir system for irrigation, in Colfax county, New Mexico. (Rec. p. 77.) The provisions of this contract and the specifications made a part of it, so far as pertinent to this case, were as follows:

"The party of the first part to furnish all necessary tools and labor, and perform all work of grading required in the construction of the Cimarron ditch and its accessories. Said work to be done in a thorough and workmanlike manner, and in full accordance with the specifications hereto attached and made part of this contract. * * * The party of the second part agrees to pay said first party for work so done at the rate of eleven cents per cubic yard, without classification. Amounts due for said work shall be paid at the time, and in the manner, described in the specifications hereto attached:

"Specification 13:—Subcontracts must be submitted to the engineer and receive his approval before work is begun under them. No second subcontractors will be allowed. Subcontractors will be bound by the same specifications as the contractor, and will be equally under the authority of the engineer.

"Specification 15:—On or about the first day of each current month the engineer will measure and compute the quantity of the material moved by the contractor during the preceding month; he will certify the amount to the company, together with an account of the same at the price stipulated, which amount will be audited by the company without unnecessary

delay, and the amount thereof, less ten per centum retained, will be paid to the contractor in cash, within ten days thereafter. This retained percentage will be held by the company as a guarantee for the faithful completion of the work, and will be paid in full with the final estimate, upon the certificate of the engineer accepting and approving the work, it being expressly understood that the failure of the contractor to fulfill his obligations will mean a forfeit of this retained percentage to the company. The amount due to the contractor under the final estimate will only be paid upon satisfactory showing that work is free from all danger from liens or claims of any kind, through failure, on his part, to liquidate his just indebtedness as connected with this work."

Previous to the making of the last mentioned contract, and on May 1, 1888, The Maxwell Land Grant Company made a contract with one C. C. Strawn and associates—who afterwards organized The Springer Land Association, which succeeded to their rights and obligations—by which The Maxwell Land Grant Company gave to them the right of way for the proposed irrigation system of ditches and reservoirs, and by which agreement it was among other things provided, that with a view to selling certain of its lands at an enhanced value, and in consideration of certain perpetual water rights and franchises to be granted to it by the other party, the Maxwell Company agreed to set apart and reserve from sale 22,000 acres of its lands to be selected by the other party, and give to the other party a certain portion of the proceeds which might be derived from the sale of said lands when sold; these lands were under the proposed ditch system and to be irrigated by it; Strawn and his associates were to expend about $60,000 or a sufficient sum to complete the

enterprise on the proposed plan. (Rec. p. 81.) The title to the lands covered by and to be irrigated by said ditch and reservoir system was at that time and at all times afterward to remain in The Maxwell Land Grant Company, except as to the rights acquired by Strawn and his associates and their successors in interest under said contract. Strawn and his associates and successors were constituted the agents of the Maxwell Company to the extent of and for the purpose of carrying into effect the contract as to the sale of the said lands, but had no other title in the lands than as given by said contract. (Rec. p. 91.)

Five days subsequent to the making of his grading contract, complainant Ford entered into another contract with The Springer Land Association, by which he agreed to select and accept one section of land under the proposed ditch system at the stipulated price of $8,000, to be taken as part payment on the contract price for Ford's grading work, by way of deduction of that sum from the final estimates on the contract for the construction of said ditch. (Rec. p. 91.)

The contract of May 1, 1888, designated one E. H. Kellogg, as the engineer to have charge of the construction of said system of ditches and reservoirs. No engineer was named in the contract between Ford and the Land Association of October 20, 1888; but said Kellogg, with the assent of all parties, acted throughout as the supervising engineer. (Rec. p. 91.)

Ford let subcontracts for portions of the work to McGarvey, Dargel and Haynes. His contract with Dargel is found on page 91 of the record. The contracts with McGarvey and Haynes were of like

form and tenor, and all were approved by said E. H. Kellogg. Estimates as provided by the contract of October 20, 1888, were made by said Kellogg, supervising engineer, from time to time, which were audited and paid by the Land Association up to about May, 1889. Estimate number 6 was dated April 30, 1889, and showed the amount then due and payable, after reserving 10 per cent, to be $5,010.92; the amount of this estimate has never been paid. On June 13, 1889, the said engineer gave to Ford a written acceptance of the work, and a final estimate for $12,625.53 in addition to the amounts of the sixth estimate. (Rec. pp. 92-3.)

The total amount stated to be due Ford by said engineer's estimates at the date of the acceptance of the work by the engineer was $17,636.45. This amount the Land Association refused to audit and pay on the ground that the sum so stated was in excess of the amount due; that the work had not been completed according to contract; that the engineer's final estimate was erroneous, either through fraud, inadvertence or mistake; that the subcontractors had not been paid the several sums due them on the work by Ford, and the property was not free from danger of liens; and also that Ford should accept the section of land which he had agreed to accept, and which he had previously selected, in payment of $8,000 of the amount of such final estimate. (Rec. p. 93.)

The Land Association procured to be made and properly executed a deed of conveyance by The Maxwell Land Grant Company, which held the title, to Patrick P. Ford, conveying to him the section of land which had been selected by the said Ford, and had the said deed present in the hands of an agent

of the said Maxwell Company on June 19, 1889, when the representative of the Land Association, said Ford, and his subcontractors met for final settlement; said deed to be delivered to said Ford upon the payment to the agent of the Maxwell Company by the Land Association of $4,000. The representative of the Land Association had with him at the time, for the purpose of making settlement with Ford, currency and valid checks on a responsible Chicago bank for $17,000. He notified said agent and Ford that he was ready to pay the $4,000 to the agent of the Maxwell Company for the deed, if Ford would settle with his subcontractors. Ford examined the deed and made no objection to it. McGarvey, one of the subcontractors then present, claimed that Ford owed him about $4,000, which Ford disputed as to $300 of it. Ford would not settle unless McGarvey would accept the amount he admitted and give him a receipt in full, which McGarvey refused to do, and claimed that he had a lien on the ditch and reservoir for the amount of his claim. The agent of the Land Association offered to pay the subcontractors directly if Ford would agree with them as to the amounts due them. No settlement was made between Ford and McGarvey. McGarvey then informed the agent of the Land Association that the work was not done according to contract, upon which the latter disputed the correctness of the final estimate and ultimately refused to audit the same. The disagreement between Ford and subcontractor McGarvey was one of the reasons why the deed was not delivered to Ford. (Rec. pp. 93-4.) The amounts claimed by the several subcontractors at the time were as follows:

McGarvey - - -	$4,308.72
Dargel - - - -	2,279.00
Haynes - - - -	800.00
Land - - - -	150.00
Total - -	$7,537.72

(Rec. p. 94.)

On July 3, 1889, complainant Ford filed notice of claim of lien for $17,634.27, alleged to be due on the contract, and $390 for extra work. (Rec. pp. 94-5.) To said notice was attached a copy of the contract of October 20, 1888, and the specifications.

On July 25, 1889, subcontractor McGarvey filed notice of lien upon the same property mentioned in Ford's claim of lien for $5,000, alleged to be due him from Ford upon said work. On August 1, 1889, subcontractor Dargel filed his notice of lien on the same property for $2,279.30. (Rec. p. 96.)

All of said notices of lien were filed in the office and within the time prescribed by law. Suits were commenced to foreclose these liens as follows:

By Dargel, February 28, 1890; by Ford, June 30, 1890; by McGarvey, July 22, 1890. All of said suits were begun within the time limited by law, and Dargel's suit was still pending at the date of the decree in this case (Rec. p. 96); this fact is recited in the decree itself. (Rec. p. 68.)

The bill filed by Ford June 30, 1890, sought to foreclose his lien for the full amount claimed by him, being $18,024.27 (including the final estimate and $390 not mentioned in the final estimate), not only upon the ditch, reservoirs and right of way therefor, but also upon 22,000 acres of land, described as

forty-six specific sections, which was outside of the ditches, reservoirs and right of way, but was alleged to be appurtenant to said ditches and reservoirs and to be irrigated thereby.

The Springer Land Association and the individuals composing it answered the bill, denying liability on substantially the same grounds as above stated for refusing to audit and pay the estimates.

Defendants also filed a cross-bill setting up substantially the same matters averred in the answer. Complainant filed a general replication to the answer and answered the cross-bill; and on the issues thus formed a vast amount of testimony was taken, the bulk of which was directed to the completion or non-completion of the work and the *bona fides* of the final estimates made by the engineer.

The District court found the law and facts for the complainant, and rendered a decree in his favor for $22,097.75 debt,—being the full amount of his claim with interest,—with costs, and $1,000 attorneys' fees, establishing a lien for that sum upon the ditch, reservoirs, right of way, and 22,000 acres of outside land, and ordering foreclosure and sale of the whole to satisfy the lien. From this decree defendants appealed to the Supreme court of the Territory of New Mexico, by which it was affirmed; and upon appeal from the judgment of the territorial court affirming the decree the case is now in this court for review. Appellants have assigned errors in due form. (Rec. pp. 116-117.)

Those upon which we rely for a reversal of the judgment below are:

That the Supreme court of New Mexico, instead of affirming the decree of the District court, should have reversed the same for the reasons:

1. That the claim or notice of lien to foreclose which this suit was brought was insufficient in law to create a lien.

2. That the amount claimed and adjudged as a lien was excessive, and included claims not due or payable.

3. That the final estimate was not payable by reason of the existence of liens of subcontractors.

4. That defendant should be entitled to be credited with the sum of $8,000 on the final estimate, on account of land which was to have been taken in payment thereon.

5. That no lien attached to the land outside of the ditches, reservoirs and the right of way for the same.

The Supreme court of New Mexico has made and certified as a part of the record, a statement of the facts of the case, and upon the facts so found alone the questions herein discussed are presented for review. (Rec. pp. 77-97.)

Act of Congress, April 7, 1874, chap. 80 (18 Stats. at Large, p. 27).

San Pedro Company vs. United States, 146 U. S. 130.

Argument.

The relief sought in this case is based upon the mechanics' lien law of New Mexico; and the portions of it applicable to the case are found in the following sections of the Compiled Laws of 1884:

"SEC. 1520: Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road or aqueduct, to create hydraulic power, or any other structure, or who performs labor in any mining claim, has a lien upon the same for the work or labor done or materials furnished by each, respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent; and every contractor, subcontractor, architect, builder, or other person having charge of any mining, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner, for the purpose of this act."

"SEC. 1522: The land upon which any building, improvement or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if at the commencement of the work, or of the furnishing the materials for the same, the land belonged to the person who caused said building, improvement or structure to be constructed, altered or repaired, but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien."

"SEC. 1524: Every original contractor, within ninety days after the completion of his contract, and

every person save the original contractor, claiming the benefit of this act, must, within sixty days after the completion of any building, improvement or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record with the county recorder of the county in which such property or some part thereof is situated, a claim containing a statement of his demands, after deducting all just credit and offset, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms, time given and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person."

"SEC. 1526: The recorder must record the claim in a book, kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed; and for which he may receive the same fees as are allowed by law for recording deeds and other instruments."

"SEC. 1529: Every building or other improvement mentioned in section 1520, constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this act; unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration or repair, or the intended construction, alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to the effect, in some conspicuous place upon said land, or upon the building or other improvement situated thereon."

"SEC. 1530: The contractor shall be entitled to recover upon a lien filed by him only such amount as may be due to him according to the terms of his contract, after deducting all claims of subcontractors under him who have filed liens for work done and materials furnished, as aforesaid, and in all cases where a lien shall be filed, under this act for work done or materials furnished to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action, the owner may withhold from the contractor the amount of money for which lien is filed, and in case of judgment against the owner, or his property, upon the lien, the said owner shall be entitled to deduct from any amount due, or to become due, by him to the contractor the amount of such judgment and costs; and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was originally the party liable."

Not only is this action a statutory proceeding pure and simple, but the lien sought to be foreclosed is a mere creature of the statute. The lien is the foundation of the action; without it there can be no foreclosure, because there is nothing to foreclose. The lien can be brought into existence only by taking the steps prescribed by the statute, which are conditions precedent to its establishment. Inasmuch as the lien is created by a summary proceeding, *ex parte*, in hostility to the owner, by which his title is to be clouded and his property encumbered without any act or concurrence of his, the tendency of the courts has been to exact a strict and substantial compliance by the intending lienor with the statutory

requirements before initiating and perfecting the lien: failing which he is left to his ordinary remedy at law against the debtor.

In Phillips on Mechanics' Liens, sec. 1, it is said:

"The lien of mechanics and material-men on buildings, and the land upon which they are erected, as security for the amount due them for work done and materials furnished, is the creation of the statute, and was unknown either at common law or in equity."

The same author, treating of the construction of these laws, says, at section 18:

"As the laws call for nothing unreasonable at the hand of him who would fasten an encumbrance upon the property of his neighbor, no just ground of complaint is afforded by insisting upon a rigid adherence to its provisions (citing *Noll vs. Swinesford*, 6 Pa. St. 187); so an act authorizing property to be encumbered without or against the consent of the owner, and without resort to legal process or judicial action, is an innovation upon the common law, and will not be extended in its operation beyond the fair and reasonable import of the words used (citing *Mushoitt vs. Silverman*, 50 N. Y. 360). Statutory provisions permitting the summary enforcement of private charges, such as mechanics' liens, on property, without the consent of the owner or judicial sanction, cannot be extended in their operation beyond the plain and fair sense of the terms in which they are expressed. A title, therefore, under the mechanics' lien law is purely statutory, and its validity depends on an affirmative showing that every essential statutory step in the creation, continuance or enforcement of the lien has been duly taken."

Id., sec. 18.

See also—

Jones on Liens, secs. 112 and 1544, 1545.

Canal Co. vs. Gordon, 6 Wall. 571.
Bottomy vs. Grace Church, 2 Calif. 90.
Wagar vs. Briscoe, 38 Mich. 587.
15 Am. & Eng. Ency. of Law, p. 5.

In *Wagar vs. Briscoe*, *supra*, speaking of mechanics' lien laws, the court said:

"In perfect agreement with the views generally maintained in the tribunals of our sister states, this court has repeatedly declared in substance that these acts are innovations upon the common law over the rights of property, by permitting the institution of private charges on property without or against the owner's assent, and without any judicial or other official sanction, and by authorizing an enforcement of such charges by unusual and summary methods, and that the provisions of these enactments cannot be extended in their operation and effect beyond the plain and fair sense of the terms; and that parties asserting liens or titles resting upon them must bring themselves and their titles plainly and distinctly within these terms and affirmatively make out that a lien was originally effected regularly and thereafter kept up, and that every essential statutory step, either in the creation, continuance or enforcement of the lien, has been duly taken. We have seen nothing to shake these opinions."

Such was emphatically declared to be the law by the Supreme court of New Mexico in *Finane vs. The Las Vegas Hotel Company*, 3 N. M. 258, and affirmed in *Minor vs. Marshall*, 27 Pac. Rep. 481.

The opinion in the case at bar, although professing to overrule *Finane vs. The Las Vegas Hotel Company*, does not really modify the principles before declared to govern the enforcement of the mechanics' lien law, though we believe its application of them to be erroneous. It equally requires a distinct and

certain compliance with all the substantial statutory requirements before the lien can attach. A "liberal construction" of such a law, which the court enjoins, means nothing more than that the object of the law shall not be defeated by unreasonable technicalities. It does not mean that courts will make new contracts for parties, or assist in fixing an *ex parte* lien upon property where the language employed would have been insufficient if concurred in by both parties; or enforce a summary security for the collection of a claim for which an action could not have been maintained at common law.

The appellants contend that the lien as claimed never attached to the property sought to be encumbered, and that by reason of the insufficient and erroneous character of the claim as filed any right to a lien that Ford might have had was lost.

I.

There Was No Sufficient or Correct Statement of Contractor's Demand.

The law (sec. 1524, *supra*) requires the contractor to file for record "a claim containing a statement of his demands." This necessarily means an account by which the elements of the claim shall be stated with such reasonable particularity as will enable the owner to intelligently determine the *bona fides* of the claim, as well as its precise nature. The statement filed in this case is for "balance due * * * by the owners or reputed owners" (who are elsewhere in the claim said to be The Maxwell Land Grant Company and certain individual trustees), "* * * under contract with The Springer Land Association * * * for excavating and

embankments done and performed" by Ford; and also a "further sum * * * for extra excavating and embankments ordered and allowed by the engineer in charge." (Rec. p. 95.)

The contract under which the work was alleged to be done is attached to the claim, and it shows that nothing could have been due by the owners of the property for any work done under it. There is nothing in the claim or the contract attached to it to show how the land of the owners (Maxwell Land Grant Company, *et al.*) can be encumbered for work done under a contract with an entirely distinct party. When the work is not done for the owner of the property, the relation which the person for whom it is done occupies to such owner must be so stated as to bring him within the list of those who under the lien law are authorized to bind such owner; otherwise the lien is void.

Warren vs. Quade, 3 Wash. St. 780.
Tacoma Lumber Co. vs. Wilson, *Id.* 786.

These cases were decided upon a statute identical with that of New Mexico.

Allegations in the bill by which it is sought to supply this defect cannot cure the insufficiency of the claim of lien. *Warren vs. Quade*, *supra*. At all events the statement of demand is directly contrary to the fact as found by the court below, and hence the claim of lien is:

a. Erroneous as to the party from whom due.

It is also:

b. Insufficient, because it contains no statement of the amount of work done; nor of the payments made; nor the estimate or acceptance by the engineer

which might perhaps take the place of such a statement.

It shows neither by direct assertion nor by any estimate, what was done, or what had been earned, under the contract. The mere mention of a lump sum as a balance due has been held by a number of authorities to be an insufficient compliance with the statute requiring a statement or account to be filed.

In *Noll vs. Swineford*, 6 Pa. 187, the claim was for "$579.65 * * * for carpenter work done and performed in and about the erection of said building, as a carpenter, and for material; to-wit: lumber furnished by said Noll, between the ninth day of June and the twenty-third day of February."

This was held to be an insufficient statement.

"Where the law calls for a just and true account, it means a fairly itemized account, showing what the materials are, the work that was done, and the price charged. A lumping item of the whole contract price on one hand, and the credits on the other, is no compliance with the law. The account should be complete on its face, and a reference to plans and specifications is worthless, and adds nothing to the statement. These liens are creatures of the statute, and the lienor must make and file an account which is a fair and substantial compliance with the law. If he fails to do this he has no lien for the labor and material and work not thus specified. It is urged that this is a case between the contractor and the owner of the property, and that there is no need of the same particularity as where a subcontractor seeks to enforce a lien. The answer is that the statute is the same in both cases, and makes no such distinction."

Rude vs. Mitchell, 97 Mo. 366.

In all mechanics' lien cases the account filed must be so itemized as to enable issue to be taken

on each item, and this whether the owner have knowledge as to the correctness of the account or not.

Heinrich vs. Carondelet, etc., 8 Mo. App. 588.

An account in gross for the entire contract price is not sufficient.

Brims vs. Capstick, 46 Mo. App. 39.

In *Shackleford vs. Beck*, 80 Va. 573, the claim as filed was: "To balance of account rendered for work and labor done and material for your house." This was held insufficient to create a lien. It having been urged that the defendants had received notice of the items making up the amount, the court said:

"But suppose in fact they did have notice, would that have cured the error or failure of appellant to file an account or statement according to the terms of the statute? Suppose he had actually shown the items of his account to Chandler and not filed it in the clerk's office at all; could he thereby assert a lien upon the property? The only question is, did the appellant proceed according to law so as to acquire a lien upon the property?"

In *Valentine vs. Rawson*, 57 Iowa, 179, the claim for lien set out the contract to build, and described the land; stated that by virtue of said contract claimant had furnished materials for said building as specified; and that two notes amounting to $183 had been given him, at and for the usual price charged for such labor and material; that the account is just and true after allowing all credits and offsets, etc. The court held that the paper failed to comply with the law, "in that it does not show when the lumber was furnished, and does not contain a

statement or account of the demand due plaintiff. The simple statement that a sum is due plaintiff for which notes were given, is not the statement or account required by the statute."

In *Wagner vs. Hansen*, 103 Calif. 104, in holding the statement in a mechanics' lien claim to be insufficient, the court said:

"Such a notice and claim of lien does not contain a true statement of the terms of the contract, as required by section 1187 of the Code of Civil Procedure. There was no other statement as to the nature of plaintiff's demand in the claim of lien. There was no account of services rendered. The purpose of the record and statement must be to inform the owner, in case of a contractor and laborers rendering service under such contract, as to the extent and nature of a lienor's claim, to facilitate investigation as to its merits. Such a statement as the above would be misleading. The lienor is required to verify the statement. In all essential particulars it must be true. See, on this point, Frazer vs. Barlow, 63 Cal. 71; Malone vs. Mining Co., 76 Cal. 578, 18 Pac. 772; Eaton vs. Malatesta, 92 Cal. 75, 28 Pac. 54. Respondent's only reply to this objection is that it is a mere technicality. Plaintiff's claim to a lien is a mere technicality. He is given a right upon condition that he complies with the statute, and there must be a substantial compliance with all these conditions to the right. Wood vs. Wrede, 46 Cal. 637."

It is therefore clear that a mere claim without a statement does not meet the requirements of the statute. The law contemplates such a statement as will enable the parties to take issue upon its correctness. Statutes which require a true account of the work done or material furnished imply an itemized or detailed statement of the transactions which are

the foundation of the lien. *2 Jones on Liens*, sec. 1417. In the case at bar it should be the more required, because there was no contract between the owner and Ford. His contract with the Land Association was not for a lump sum, but for a specified price per cubic yard for the work done by him. Payments had been made, of which no mention is made in the claim. It is a case where a statement of details and items was not only possible, but natural and proper. There was nothing difficult or unreasonable in a strict compliance with the law.

II.

The Amount Claimed in the Lien was Excessive Because no Cause of Action Existed Upon the Final Estimate.

The law requiring a "statement of his demands after allowing all just credits and offsets," implies that such statement shall be true. If by reason of facts disclosed upon the trial it appears that the amount of money claimed was, in fact, not then due or payable, in whole or in part, the lien is necessarily defeated, if not entirely, at least *pro tanto*. It does not require argument to prove that if Ford had no right of action upon his contract, he could not obtain a mechanics' lien based on it. If he could not recover in an action at law, he could neither create a lien by filing nor enforce it by suit. If by the terms of the contract between the parties the claim was not legally demandable, no lien could be founded upon it.

"It is familiar law that there can be no foreclosure of a lien until the debt for which the lien is made and held as security has become payable."

Harmon vs. Ashmead, 60 Calif. 441, and cases cited.

"It must show not only that the debt is owing, but that it had become payable before the commencement of the action, so that there was at that time a cause of action."

Jones on Liens, sec. 1588.

Such we claim to be the case here for two reasons:

1. The final estimate of $13,625.53 was not yet payable.

The contract (specification 15, Rec. p. 80) contains the following provision:

"The amount due to the contractor under the final estimate will only be paid upon satisfactory showing that the work is free from all danger from liens or claims of any kind, through failure on his part to liquidate his just indebtedness as connected with this work."

Such a showing is a condition precedent to the right to recover the amount of the final estimate. Ford could not legally demand its payment nor obtain judgment for the amount, without proof of this fact. *A fortiori* must he fail in any action therefor if it be shown by the defendant that when the suit was brought not only was there danger of such liens, but they actually existed in full force as encumbrances on the property. By Section 1524 of the Mechanics' Lien Law, *supra*, the subcontractors had sixty days from the completion of the work in which to file their liens. If, therefore, upon the completion of the work and the making of the final estimate, anything was due and unpaid to a subcontractor, the work could not be said to be free

from danger of liens until the expiration of sixty days, which would be the thirteenth of August, forty days after Ford's lien was filed; unless in the meantime the subcontractors were fully paid off.

It appears by the statement of facts made by the lower court (Rec. p. 93) that the parties met for settlement on June 19, 1889; that the representative of the Land Association had with him ample funds for the purpose of making a final settlement; that the subcontractors were there demanding payment; that Ford disputed the account of the largest one, and refused to pay him unless he would accept a less amount and give Ford a receipt in full; that the subcontractor refused to do this, and claimed that he had a lien on the ditch and reservoir for the amount of his account; that the agent of the Land Association then offered to pay the subcontractors directly if Ford would agree with them as to the amounts due them, but that no settlement was made between Ford and McGarvey; that the amounts claimed by the several subcontractors at the time aggregated $7,537.72; that subsequently, and within the time prescribed by law, the two largest subcontractors filed claims of lien on the property for $5,000 and $2,279.50 respectively, brought suits thereon in due time, one of which was still pending at the date of the decree in the District court in this case. (Rec. pp. 68 and 96.) Hence not only was the property not free from danger of liens when Ford's lien was filed, but when he brought this suit liens actually existed, claims therefor had been filed on the property to the amount of $7,279.50, and suit was already brought to foreclose one of them.

So long as this state of facts remained it must be clear that no recovery could be had for the amount

due upon the final estimate in any form of action. Such provisions as that in specification 15 are very common, probably now universal, in building contracts. Their object is to protect the owner from having to pay twice for the same work. They are reasonable and necessary, of great importance to the owner, and of no hardship to the contractor. They have been held by the courts to be absolutely binding, and failure to observe them fatal to the contractor's right of action.

Phillips, in his work on Mechanics' Liens, says:

"A substantial performance, according to the terms and conditions agreed upon, is a condition precedent to the builder's right to maintain an action under the mechanics' lien law." (Sec. 134.)

"The rule is well established that where a party by his own contract creates a duty or charge upon himself, not absolutely impossible, his undertaking must be substantially complied with under any and all circumstances." (*Ib.* sec. 135.)

"So if a contract stipulates that no payment is to be considered as due if at the time there are any liens on the building in consequence of the acts of the contractor, the latter will be held to the performance of this stipulation and there can be no lien as long as he is in default." (*Ib.* sec. 136.)

In Holmes vs. Richet, 56 Calif. 307, 316, the contract provided:

"That for each of said payments a certificate shall be obtained from and be signed by the architect; and also, that the time of the presentation of either of the said certificates there be neither opposition against the said payments, nor any liens against the aforesaid building."

The District court found that before the last installment became due a lien was filed upon the

building, and therefore such installment was not due and payable according to the terms of the contract. As that court also decreed that the amount of this lien should be deducted from the amount due the contractor at the time the suit was brought, it was claimed that the order of the court deducting the amount of this lien from the amount due the contractor operated as a payment and discharge of said lien, and therefore the last installment was due and payable. Upon this proposition the Supreme court of California said:

"It is a sufficient answer to the argument made in support of this proposition that the parties have expressly contracted that if any lien upon the property shall exist at the time when an installment would be otherwise due and payable, the existence of such lien shall constitute a good and sufficient reason for the nonpayment thereof. This we understand to be the effect and meaning of the agreement, and it is simply the duty of the court to enforce contracts as the parties have made them."

It is held in the opinion of the court below that Ford was excused from performance of this stipulation because defendant had not paid him the amounts due on the 6th estimate, or the final estimate. It states that—"there is nothing to show that Ford had not promptly paid his subcontractors out of the money received, or that he was not responsible for the money due his subcontractors. It could not be maintained that Ford should or could pay the subcontractors until he received his money for the work." (Rec. p. 112.)

The answer to this is that the parties expressly contracted otherwise. The final estimate was not to be payable until the property was shown to be free

from danger of liens; and Ford could have shown this either by payment of the subcontractors, or by obtaining from them a release of all claim of lien, or still more simply by giving them orders on the Land Association for the amounts due them, payment of which would operate as a discharge of their liens and payment to Ford at the same time. This was in fact practically proposed by defendant and refused by Ford.

It has been claimed in argument that the non-payment of the 6th estimate relieved Ford of the consequences of the stipulation in specification 15, because the danger from liens did not exist "through failure on his part to liquidate his just indebtedness," but through defendants' failure to pay him. This proposition cannot avail in this case, for two complete reasons:

1. The amount of the 6th estimate was not sufficient to pay the subcontractors,—being only $5,010.92; whereas their claims amounted to $7,537.72.

2. The defendant, before the filing of any liens, offered to pay off all the subcontractors directly if Ford would adjust the amounts due them, which he unreasonably refused to do.

It has also been claimed that because Kellogg, the engineer in charge, approved the contracts of Ford with the subcontractors, in which it was provided that their pay should not be due them until Ford should receive his from the Land Association, the provision in specification 15 was thereby abrogated. But nowhere can there be found any authority in Kellogg to make new contracts for the Land Association, or to modify those it had already made. His position, as stated in the findings of fact by the

lower court, was that of supervising engineer, with the assent of all parties, no engineer being named in the contract between Ford and the Land Association. (Rec. p. 91.) His agency was a limited one —to supervise the carrying out of the contract made by the principals. It is inconceivable that in a mere provision requiring him to approve the subcontracts there should be found by implication authority to rescind, in whole or in part, the very contract whose execution he was designated to supervise. Such provisions are common, and their object is to enable the engineer to see that nothing prejudicial to the completion of the work according to the plans is agreed upon with subcontractors, and to ensure the control which he is to have over them as well as the contractor.

2. A credit of $8,000 for payment in land should have been made on the final estimate.

As is set forth in the statement of facts, five days after the making of the grading contract, Ford entered into another contract with The Springer Land Association by which he agreed to select and accept one section of land under the proposed ditch system at the stipulated price of $8,000, "to be taken as part payment on the contract price for Ford's grading work, by way of deduction of that sum from the final estimates on the contract for the construction of said ditch." (Rec. p. 91.) It further appears as facts found by the court below that the Land Association procured to be made and properly executed a deed of conveyance by the Maxwell Company, which held the title, to Ford, for the section of land which had been selected by Ford; and had the deed present in the hands of an agent of the Maxwell Company at the meeting on June 19,

1889, to be delivered to Ford upon payment to such agent by the Land Association of $4,000; that the representative of the Land Association had with him at that time sufficient funds to pay said sum, and notified said agent and Ford that he was ready to pay the $4,000 for the deed, if Ford would settle with his subcontractors; that Ford examined the deed and made no objection to it; that the disagreement between Ford and subcontractor McGarvey was one of the reasons why the deed was not delivered to Ford. (Rec. pp. 93, 94.) The statement further says that the representative of the Land Association did not tender to the agent of the Maxwell Company the amount due it upon said deed, and that no sufficient tender of the deed was made to Ford to require him to accept it.

The last statement of the court below as to a tender of the deed is that of a conclusion of law rather than a fact. It does not affect this question, in view of the facts previously stated, which show conclusively that no tender was necessary. The deed was there ready to be delivered to Ford on payment of the $4,000 to the holder of the title; the money was there to pay it; and payment was offered upon the one condition that Ford should settle with his subcontractors, for which purpose also payment was offered if he would adjust the amounts. This condition was proper and fully warranted by the contract. The Land Association was not bound to make an unconditional tender or delivery of the deed in payment of the $8,000 on the final estimate, so long as there were unpaid claims of subcontractors which might become liens on the property. Until these were settled the land was not due, and the Association could not, with safety to itself, deliver the deed,

any more than it could safely pay the balance of the final estimate in money.

This is one of the cases where the rule of law requiring an unconditional tender as a condition precedent to establishment of any right under the contract, does not apply. The suit is in equity, and in addition to the observance of the statutory requirements necessary to enable him to create and enforce a lien, complainant is bound by the rules and maxims of equity jurisprudence;—among others that he who seeks equity must do equity, and that equity does not require an unreasonable or unnecessary thing. The principle governing actions for specific performance of contracts is manifestly applicable here. This is stated by Pomeroy—3 Equity Jurisp., sec. 1407—as follows:

"The doctrine is fundamental that either of the parties, seeking a specific performance against the other, must show, as a condition precedent to his obtaining the remedy, that he has done or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit."

In the note to that section on page 453, he says:

"In general the rules of equity concerning the necessity of an *actual* tender are not so stringent as those of the law. * * * An actual tender by the plaintiff is unnecessary when, from the acts of the defendant, or from the situation of the property, it would be wholly nugatory."

Further on in the same note (p. 454), in discussing a conflict of the American decisions, he states as the rule more in accordance with the principles of equity:

"That in such contracts an actual tender or demand by plaintiff prior to the suit is not necessary. It is enough that he was ready and willing, and offered at the time specified * * *. The plaintiff's performance will be provided for in the decree."

And he adds: "This is unquestionably the true equitable doctrine."

The subject is discussed more at length in Waterman on Specific Performance, from which the following extracts are made:

"With regard more particularly to what constitutes an offer to perform, it is sufficient, in general, that a party has made a *bona fide*, reasonable and earnest effort to fulfill; and the court will disregard technical objections on the other side which have the appearance of an attempt to get rid of the contract." (Sec. 439.)

"When the purchaser is to pay, and the vendor upon payment to convey, performance, or an offer to perform, is a condition precedent to the right to insist upon performance by the other party." (Sec. 443.)

"Although when a strict tender is required, it must be an unconditional offer of the full amount due, leaving it only at the will of the other to accept it, yet when one is to pay money and the other to give a conveyance, no time fixed and no provision that either shall be done first, the covenants being mutual and dependant, one is not bound to pay without receiving his conveyance, nor the other to part with his land without receiving his money. In such case it is not necessary, on the part of the purchaser, to make a strict tender, and actually to deliver over the money unconditionally without his deed. It is sufficient that upon reasonable notice to the owner, he is ready and willing to perform, and when performance is the payment of money, that he has the money and is able and prepared to pay, and demands

the deed, and the other refuses to receive the money and execute the deed." (Sec. 444.)

"When the facts alleged in the bill, or given in evidence, show that an offer of performance by the plaintiff would not have been accepted, such offer is thereby rendered unnecessary. * * * The mere neglect of the vendor to tender to the vendee a deed, when the vendee is not injured by the delay, is not sufficient to preclude him from maintaining a suit to compel the vendee to receive the title." (Sec. 446.)

The distinction as to the rule of tender between law and equity, and the reason for it as well, are nowhere more concisely stated than by the Supreme court of Iowa in *Winton vs. Sherman*, 20 Iowa, 296, as follows:

"In an action at law to recover the consideration agreed to be paid for real estate not yet conveyed, but which, by the contract of purchase, was to be conveyed at the time of payment of the consideration, it has been held a sufficient defense to aver and show that the deed had not been delivered or tendered. But this rule does not obtain in equity cases, where the court upon final decree can grant just such relief as the plaintiff can show himself entitled to, upon such conditions as shall fully protect the right of the defendant, not only as to the subject matter, but as to costs. A delivery or tender of a deed, before bringing suit in equity for the purchase money and foreclosure of a lien therefor, or other equitable relief, is not necessary. See *Rutherford vs. Harris*, 11 Iowa, 587, and cases cited."

In the last cited case, the court said:

"In our opinion, the reason for the rule in a law action does not apply in a court of equity. At law if the vendor recovers his judgment for the purchase money, it must necessarily, from the nature of

the tribunal, be unconditional and without terms. In equity the chancellor has full power to protect the vendee, and to make the execution and deposit of the deed with the clerk, or other person to be named, a condition precedent to the enforcement of the decree."

The ruling on the question of this land payment illustrates most forcibly the erroneous theory upon which the lower court administers the mechanics' lien law in an equitable action. In order to preserve to Ford a lien for the amount of the final estimate, it ignores an express provision of the contract by which it was not yet payable, on the ground that "to hold otherwise would be both unreasonable and unjust." (Opinion, Rec. p. 112.) And in order to give him additional security, it extends the lien to large areas of land outside of that covered by the improvements, without any finding such as the law expressly requires to authorize it, because to do otherwise would "defeat the spirit and intent of the law." (Rec. p. 109.) But when defendant seeks to avail itself of an express contract right to make part payment in land, the court defeats him by invoking one of the strictest of common law rules, without the least reference to what would be "reasonable and just," or other equitable considerations.

3. The decree is clearly erroneous as to the $390 claimed in the lien for extra work.

It is not included in the final or any other estimate, and there is not the slightest evidence in the record that it was allowed by the engineer, or was due for any reason. On the contrary, the fact is distinctly stated in the findings by the lower court (Rec. p. 93), that "the total amount due Ford by the engineer's estimates at the date of the acceptance of the

work was $17,636.45"; whereas the judgment is for $18,069.20, with interest at six per cent per annum, on $6,010.82 of it from May 10, 1889, and upon the residue from June 13, 1889, (Conclusion of Law III. Rec. p. 65) which makes the total of $22,097.75, "being the amount mentioned in his notice of lien with interest," etc., adjudged as a lien by the decree. (Rec. p. 65.)

An innocent overstatement of the amount of the claim will not invalidate a mechanics' lien, but it requires a liberal construction to find this one free from misstatement, which a more careful regard for contract rights and facts might have avoided. It seems to us perfectly established that the claim of lien was erroneous to the entire amount of the final estimate of $12,625.53, and the $390 for extra work —making $13,015.53—which should be deducted from the amount adjudged by the decree, as of date June 13, 1889, the date from which interest was computed and allowed on it. (Rec. p. 65.)

But if by any means this proposition can be overcome, the decree of foreclosure is still erroneous in failing to give the defendant the right to pay the sum of $8,000 in land, to be credited as of June 19, 1889—the date when it was ready and willing and offered to do so—upon its delivering to complainant, within a reasonable time, a deed for the land.

If it be asked why the defendant has never paid anything on the last two estimates, the answer is that the record shows that there has never been a time to this day when the property was free from the lien of a subcontractor. And besides, it appears in the findings below that upon the failure of Ford to settle with his subcontractors at the meeting on June

19, 1889, one of them informed the agent of the Land Association that the work was not done according to contract, whereupon the latter disputed the correctness of the final estimate and ultimately refused to audit the same. The pleadings show that the Land Association contested the engineer's estimate upon very serious grounds, viz: incorrectness, due to fraud and collusion between Ford and the engineer, and nonperformance of the work according to the contract. While these issues have been found against defendants by the lower court, and cannot be re-examined here, yet there is enough in the statement of facts and the opinion to show that it was a very substantial controversy. The court states that "as to whether the work was completed according to the contract and specifications, there is a vast amount of conflicting expert testimony;" but finds that the acceptance by the engineer was conclusive. (Rec. p. 97.)

III.

There Is No Lien on the 22,000 Acres of Land Outside the Ditch and Right of Way.

It will be observed that in the notice filed a lien was claimed upon two distinct things, viz. (Rec. p. 95):

1. "The said ditch, and land appurtenant thereto for right of way, being of about the uniform width of sixty feet; together with all lateral ditches and reservoirs, and the land covered by and appurtenant to the same as aforesaid."

2. "Also 22,000 acres of land appurtenant to said ditch, and under said ditch and to be irrigated thereby," described as being in certain designated sections.

Three things may be subjected to a lien under the Mechanics' Lien law:

1. The building, ditch, or other structure. (Sec. 1520, *supra*.)

2. The land upon which it is constructed. (Sec. 1522.)

3. A convenient space about the same, or so much as may be required for the convenient use and occupation thereof; provided the land belonged to the person who caused the improvement to be made, or if not, then his interest. (Sec. 1522.)

The first of the subjects claimed in Ford's lien, embracing "the ditch and land appurtenant thereto for right of way," being about sixty feet in width, is no doubt property subject to the lien, if any exists. This also includes all three of the things provided for by the statute as above stated. It is evident that the lands appurtenant to the ditch for right of way, sixty feet wide, are those required for the convenient use and occupation of the ditch, and are all that are so required.

The second subject of the claim is 22,000 acres of land, which the finding of the lower court declares to be "outside of the ditches and reservoirs, and the right of way for the same;" that they were "appurtenant to said ditch and reservoirs, were under said ditch and to be irrigated thereby;" that "a number of them were not flooded or situated so as to be overflowed with water or irrigated from the ditch;" that "all of said sections were situated between the line of said ditch and the river, and were enhanced in value by reason of its construction." (Rec. p. 96.)

It will be observed that neither in the claim of lien, the bill of complaint, the findings or decree of the District court, nor in the statement of facts by

the Supreme court of New Mexico, is there any statement that these lands, or any portion of them, are "required for the convenient use and occupation" of the improvement; which the law (sec. 1522) expressly requires "to be determined by the court on rendering judgment;" or that at the commencement of the work the land belonged to the person who caused the improvement to be constructed. Unless these two things concur, there can be no lien upon the land beyond that upon which the improvement is constructed. Not only do they not appear in the record, but it affirmatively appears that the land did *not* belong to the person causing the improvement to be made. It was owned by The Maxwell Land Grant Company, and not by the parties with whom Ford contracted. (Rec. p. 91.) It is alleged in the bill that the work was done with knowledge of the Maxwell Company, and that it did not give notice that it would not be responsible for liens, evidently in order to bring that company within the provisions of section 1529. But this section only applies to land *upon which* the improvement is constructed, and has no reference to appurtenant or other lands not actually occupied by the structure. The only case in which the owner is bound by the acts of others, or by his own silence, are those mentioned in sections 1520 and 1529. The first gives a lien on the improvement for work done at the instance of the owner, or his agents, and provides that every contractor, etc., shall be held to be the agent of the owner for the purpose of the act. The last, as to the improvements constructed *upon any land* with knowledge of the owner, gives a lien upon his interest therein, if he does not give notice, etc. But neither of these sections gives

any lien upon outside lands, or upon anything except the *improvement*, and the *land upon which* it is constructed.

The outside land cannot be subjected to a lien except by bringing it clearly and distinctly within the terms of section 1522. As to ownership, there is a complete failure to do so. It has been contended that the word "appurtenant" brings this land within the law. But the statute says nothing about "appurtenant," and when applied to this question the word is without meaning or value. If this land is required for the convenient use and occupation of the ditch, which would seem to be fully provided by the sixty-foot right-of-way strip, it would have been perfectly easy and natural to say so, and have it determined by the court on rendering the decree as the law requires. The learned court below holds that this land is required to make additional security for the builder, and that it should pass under the lien because the construction of the ditch enhances its value. If this proposition is sound, then a whole townsite would be liable to a lien for the cost of every business structure erected on the lots of individual owners. It is best answered, however, by citing some decisions of the Supreme court of California upon this identical clause in the California statute, from which the New Mexico statute was taken *verbatim*.

Green vs. Chandler, 54 Calif. 626, holds that where the complaint contains no allegation to that effect, the trial court had no authority to find that the whole of the parcel of land on which the building is situated was "required for the convenient use and occupation of said mill," etc.

In *Tunis vs. Lakeport*, 98 Calif. 285 (33 Pac.

Rep. 63), a mechanics' lien was foreclosed upon a hotel and saloon building, and a tract of land known as the "Fair-grounds tract" was declared by the trial court to be necessary for the convenient use and occupation of these buildings, and ordered sold. This judgment was reversed, and the court discussed the proper construction of this statute as follows:

"The expression, 'the land upon which any building * * * is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof,' should be construed to mean such space or area of land as is necessary to the enjoyment of the building for the purpose in view of its construction. The uses to which a building is to be put must manifestly, many times, determine the quantity of land necessary to the convenient use and occupation thereof. If erected as a mill for sawing lumber, the space required for a log and lumber yard would be regarded as necessary to its use, while like space around a similar building for a watch factory might not be at all necessary. This thing should be borne in mind: It is for the convenient use and occupation of the building that the land about the same is given by our statute. A flouring mill erected upon a large grain ranch would require a given space around it for the purposes incidental to its operations. It might require the whole ranch to create business for it. But it would not follow, under our statute, that the entire ranch would be subject to a lien for its erection. In the present case it is easy to see that the race track, with its training stables, grand stand, corrals and other improvements, may be necessary to create business for the hotel, club house and saloon, for which the building in question was constructed; but it is not at all apparent that they are necessary to the convenient use and occupation of the building for the purposes indicated. Their uses are foreign to its purposes, except as they may tend to bring custom to its doors."

The same court, in July, 1895, about the same time as the decision of the New Mexico court in this case, reiterated the doctrine of the last case in *Cowan vs. Griffith*, 108 Calif. 224 (41 Pac. Rep. 42). A lien was claimed for erecting a dwelling house on a forty-acre tract of land planted to figs and vines. The trial court found that the whole forty acres was necessary for the convenient use and occupation of the house, and decreed a sale of the whole to satisfy the lien. This judgment was reversed, the Supreme court saying:

"For the convenient use and occupation of this dwelling house it is very evident that forty acres of land is not necessary. The statute does not contemplate anything of that kind. It means exactly what it says—a sufficient space around the dwelling for its convenient use and occupation. It does not contemplate that sufficient land around the dwelling house to support the owner while living there be set apart. Very possibly forty acres would not be sufficient for such a purpose; and if the dwelling house was situated upon a section of farming land, upon the same line of reasoning as has been here adopted, the entire section should be set apart. Neither the productiveness or non-productiveness of the soil, nor the profit derived from the cultivation of the land, is a material element to be considered in determining the amount of land to be set apart with the dwelling house, under this section (1185) of the Code of Civil Procedure."

In the case at bar the effort is not simply to make the lien attach to a distinct tract of land on which the improvement is situated, but to include wholly different tracts, and subdivisions in other sections and townships, and which are not even identified with accuracy.

These lands do not by any means constitute a

compact body. Mere inspection of the section and township numbers shows that they are greatly scattered, with intervals between different sections of from one to three miles. The sections in Township 25 north, range 22 east, are three miles distant from the nearest of the others. The course of the ditch is said in the lien claim (Rec. p. 94) to be eastwardly, and as all the lands are said by the lower court to be between the ditch and the river (Rec. p. 96), it is apparent that they are from one to twelve miles distant from the ditch.

The description of these outside lands is wholly insufficient. They are in nowise identified so that an officer can ascertain what to sell, or a purchaser know what lands are encumbered or conveyed. They are said in the decree to be "22,000 acres of land * * * under said ditch and to be irrigated thereby, and described according to townships and sections as follows." Then follows an enumeration of forty-six complete sections, which, if regular, would contain 29,440 acres. Which 22,000 acres is intended does not appear; nor could any man, searching the records for the title to any quarter section within the forty-six sections mentioned, ascertain, either from the claim of lien or the decree of the court, whether it was included in the 22,000 acres or not. In the finding of facts by the lower court it is said that these lands "were included within the sections described in the notice of lien and bill of complaint;" that "it does appear that in a number of said sections only portions of the section were selected (under the contract of May 1, 1888) because a number of them were not flooded or situated so as to be overflowed with water or irrigated from the ditch." (Rec. p. 96.)

This makes it perfectly clear that there were considerable portions of the sections described not covered by the lien. In the opinion of the lower court it is contended that sixteen of these sections may have been fractional, and contained less than 640 acres; and that the rule that in descriptions of real estate quantity must yield to metes and bounds is controlling here. But it is well known that the discrepancies due to imperfect closings on the township lines are comparatively small, and could not be enough to reduce by three-fourths the total area of these sixteen sections, which would be required to account for the 7,447 acres difference. And the rule of construction invoked only applies where the conveyance is by metes and bounds, and quantity is only mentioned in addition. But such is not the case here. The description calls for *22,000 acres*, and this quantity is undoubtedly a controlling fact, because it must be taken in connection with the fact found by the court that only parts of the sections were irrigable and were selected or segregated by the Land Association under its contract of May 1, 1888 (Rec. p. 96), and the further fact that only 22,000 acres of land were allotted to the enterprise.

It is, therefore, as if the description read: "22,000 acres, being part of"—the forty-six sections, which would be palpably and incurably void for uncertainty.

Phillips on Mechanics' Liens, sec. 385.

It is not only the matter of uncertainty that is fatal here; but the moment it is admitted that only parts of these sections were selected as irrigable, and that they contain land in excess of the 22,000 acres of irrigable land provided for in the contract of May

1, 1888, as set apart for this enterprise, the decree becomes erroneous, because it necessarily includes more land than is connected with the ditch on any possible theory.

Appellants contend that in any event the decree must be reversed, with directions either to dismiss the bill for want of a sufficient lien, or to modify the decree as to the amount of the lien and the law covered by it.

Respectfully submitted,

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